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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 RIO TINTO PLC,

4 Plaintiff,

5 v.

14 CV 3042 (RMB) (AJP)

6 VALE, S.A., ET AL.,

7 Defendants.

8 -----x
9 New York, N.Y.
November 3, 2014
10 9:37 a.m.

11 Before:

12 HON. ANDREW J. PECK,

13 Magistrate Judge

14 APPEARANCES

15 QUINN EMANUEL URQUHART & SULLIVAN, LLP

16 Attorneys for Plaintiff

17 BY: MICHAEL J. LYLE

ERIC C. LYTTLE

18 CLEARY GOTTlieb STEEN & HAMILTON LLP

19 Attorneys for Defendant Vale, S.A.

20 BY: LEWIS J. LIMAN

MATTHEW M. KARLAN

21 MISHCON DE REYA NEW YORK, LLP

22 Attorneys for Defendants BSG RESOURCES LIMITED AND
23 BENJAMIN STEINMETZ

24 BY: VINCENT FILARDO, JR.

ELIZABETH M. ROTENBERG-SCHWARTZ

KAVITHA S. SIVASHANKER

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APPEARANCES (Continued)

LAW OFFICES OF MARTIN J. AUERBACH, ESQ.

Attorney for Defendant BSGR Resources Guinee SARL

BY: MARTIN J. AUERBACH

SULLIVAN & WORCESTER, LLP

Attorneys for Defendant Mahmoud Thiam

BY: PAUL E. SUMMIT

KAREN E. ABRAVANEL

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1 (In open court)

2 THE COURT: Be seated. Okay. We have a ton of
3 discovery disputes to deal with today. I must say, I'm not
4 happy that things are going so slowly, and to a certain extent,
5 the fact that you are going so slowly encourages me to sit on
6 the motion for a stay for a longer period to let you get done
7 what I think you should get done.

8 In any event, let's deal first with the dispute as to
9 Thiam, or however I should be pronouncing that.

10 MR. SUMMIT: Good morning, your Honor. Paul Summit
11 for Thiam.

12 MR. LYLE: Good morning, your Honor. Michael Lyle for
13 Rio Tinto.

14 THE COURT: Proceed.

15 MR. LYLE: Your Honor, Mr. Lyttle will be handling the
16 argument for Mr. Thiam.

17 THE COURT: Okay.

18 MR. LYTTLE: Good morning, your Honor. Your Honor, I
19 think this is a pretty simple dispute. Defendant Thiam has
20 asserted a number of hypothetical privileges arising out of
21 Guinean law, potential confidentiality agreements. All we're
22 asking for in our premotion letter is leave to file a motion to
23 compel by which defendant Thiam can identify what exactly these
24 Guinean laws are.

25 THE COURT: As you know by now, we try to avoid

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1 motions; so, in a sense, this is the motion. And unless there
2 is an actual privilege, or at least a disputed privilege, then
3 you're going to have to produce. So let me turn it over to
4 Mr. Summit.

5 MR. SUMMIT: Thank you, Judge. This lawsuit pertains
6 to Mr. Thiam's role as a government minister, as you know. We
7 do have an indication of authority that some of the documents
8 which we presume they are seeking -- let me return to that in a
9 moment -- that some of those documents may be precluded from
10 disclosure by Guinean law.

11 Now, let me back up a second. We have been asking
12 plaintiff for a search-term methodology so that we can winnow
13 down the documents that are responsive and, thus, identify a
14 subset that may be protected from disclosure by Guinean law,
15 and they have declined to enter into such discussions. They
16 have declined, in other words, to give us a way to cull, out of
17 approximately 200,000 e-mails and attached documents, to cull
18 down to what may be responsive and, thus, to know the scope of
19 the problem to begin with. That's No. 1.

20 No. 2. As to the Guinean law issue, there is a tiny
21 community, as you can imagine, of Guinean lawyers and Guinean
22 law experts. We have endeavored, and we are continuing to
23 endeavor, to find a disinterested Guinean law expert.

24 THE COURT: But the requests were served in June.
25 We're now four to six months later. Enough is enough.

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1 MR. SUMMIT: But the last time we heard from the
2 plaintiffs was October 15th. They said, please make
3 expeditious progress. There was no deadline. They have not,
4 indeed, responded on the critical question of search terms.

5 THE COURT: Now, then that's simple. Do what you
6 think gets them what they're entitled to under their requests.
7 On the one hand, I'm a big believer in the Sedona Conference
8 Cooperation Proclamation, but it also applies that Sedona
9 Principle 6 says that the producing parties are in the best
10 position to describe how to search its documents.

11 So you come up with a protocol, give it to them, and
12 if they don't have a legitimate response, you'll use your
13 protocol. But let's get it done. No more, I'm waiting for a
14 good person on privilege. If you can't find someone, there is
15 no privilege. In addition, I think I've given you all a 502D
16 order, have I not? Somebody help me out here.

17 MR. LYTTLE: Yes, your Honor.

18 MR. LYLE: Yes.

19 MR. SUMMIT: Yes.

20 THE COURT: So you'll at least have that protection.

21 MR. SUMMIT: Yes, indeed.

22 THE COURT: But I have given you all, on the grounds
23 that this is a big case and that you're all big boys and girls,
24 that you're going to work it out. I think it may be time for
25 me to put deadlines on all of you.

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1 Plaintiff, from some of the time lines in some of
2 these requests is not getting back to defendants as promptly as
3 I would think a plaintiff should. Defendants, I think, are
4 dragging their feet in the hope that there will either be a
5 stay or that Judge Berman will send you off to somewhere else.

6 Until there is a stay, and you can assume you're not
7 going to get one, you may get one, but assume you're not, let's
8 get going. How soon can you make production?

9 MR. SUMMIT: Well, if we are going to select the
10 search terms, which I think is --

11 THE COURT: In good faith.

12 MR. SUMMIT: Of course. But in my experience, that's
13 unusual, given that it's their burden of proof and it's their
14 amended complaint, but --

15 THE COURT: Not for search terms.

16 MR. SUMMIT: All right.

17 THE COURT: They have --

18 MR. SUMMIT: Then --

19 THE COURT: Stop. They have given you discovery
20 requests. Now, let's go back to the good old paper days. They
21 didn't say which paralegals you should use and how you should
22 instruct them. You, as the responding lawyer, said, you know,
23 this is relevant to that request or this isn't relevant to that
24 request.

25 I would like to see cooperation, and I may give

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1 Mr. Lyttle a chance to respond to here as to why they're not
2 doing anything, if that's the case, but you know the data.
3 Your client knows the data. If they came up with the search
4 terms, it is, as I have stated I think in the Silver Moore
5 and/or William A. Gross, and certainly in conferences, it's
6 like the game of Go Fish. You know, kids' game. You got any
7 tens? No, go fish. You got anything hitting this key word?
8 Yes, no. Go fish.

9 So you propose what you want to them. They will have
10 a very short opportunity to key in and say that's too narrow or
11 too broad or whatever else they're going to say. If they don't
12 make any comment at that point, I'm not going to listen very
13 much at the end that what you did was improper.

14 How soon can you make production, including any
15 privilege log for whatever you're going to say is privileged?

16 MR. SUMMIT: We have about a 200,000 e-mails.

17 THE COURT: So next week?

18 MR. SUMMIT: No. Respectfully, no.

19 THE COURT: I was being facetious when I said next
20 week, but I would be careful. If you tell me some ridiculously
21 long period to go through them, six months after the discovery
22 request --

23 MR. SUMMIT: No, I do -- I get the sense that we don't
24 have a great deal of time this morning; so I won't go into this
25 in detail. But we could demonstrate to your Honor that a

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1 tremendous amount of the time passage here rests on plaintiff.

2 I mean, there is no question about that from the record.

3 THE COURT: Okay. But at this point, even taking that
4 into account, I'd like to get this done.

5 MR. SUMMIT: I appreciate that. I get that message
6 loud and clear, Judge.

7 THE COURT: When?

8 MR. SUMMIT: I would say a month.

9 THE COURT: Any objection?

10 MR. LYTTLE: No objection, your Honor.

11 THE COURT: Okay. A month from today, which I assume
12 is December 3; so --

13 MR. SUMMIT: And, your Honor?

14 THE COURT: Yes. And if you are claiming privilege, I
15 want a privilege log and, you know, a brief on what the Guinean
16 privilege is.

17 MR. SUMMIT: I would also just want to say one other
18 thing for the record here. We are in a case -- "we" being
19 Thiam -- we are in a case of corporate defendants. Thiam is an
20 individual. Regardless of what we regard as the reckless and
21 baseless allegations, and shifting allegations I might add,
22 shifting dramatically from the original complaint to the
23 amended complaint.

24 Regardless of those allegations as to Thiam, we are
25 dealing with an individual defendant with very limited

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1 resources, and I do think that has to be taken into account in
2 connection with Thiam's resources to handle this discovery
3 burden. And it's one of the reasons that the motion to stay is
4 especially important, I think, to this individual defendant.

5 THE COURT: Understood.

6 MR. SUMMIT: All right? All right. Thank you, Judge.

7 THE COURT: You asked for a month. I gave you the
8 month.

9 MR. LYTTLE: Your Honor, may I be heard on the search
10 terms?

11 THE COURT: Yes.

12 MR. LYTTLE: I think your view of the Sedona
13 Principles is exactly one that we have shared. We have asked
14 defendants multiple times, provide us a list. Let us come.
15 Let's kick off discussions. They repeatedly said no. It's
16 your burden. Get us search terms.

17 They know their data. We haven't heard this 200,000
18 number until today. We'll be happy to comment quickly on
19 search terms and come to agreement with them hopefully on the
20 scope that search.

21 THE COURT: Okay. I expect cooperation, but one way
22 or the other, December 3 is the deadline, and the odds of me
23 extending that are not good.

24 Okay. Next issue, and I'm sort of taking these in the
25 way the letters came in.

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1 MR. LIMAN: Your Honor, may I be heard just briefly
2 with respect to the issue of defendant's delay? Because, your
3 Honor, I think I can understand how you might have that
4 perception, but I want to lay out the facts and the chronology
5 just to set the record straight.

6 Your Honor, we last appeared before you approximately
7 one month ago. Two weeks ago today, the plaintiffs filed a
8 brief before your Honor, made a statement to all of the
9 defendants here, in which they said that discovery would
10 present no additional burden on the defendants, and all that
11 they were seeking, all we should have to do, would be to
12 produce whatever went to the grand jury.

13 In that two-week time period, from when we appeared in
14 front of your Honor until when that brief was filed, there was
15 very little contact from the plaintiffs whatsoever. And we're
16 entitled, I think, your Honor, to take that representation to
17 be true.

18 One week after at that time, your Honor, we filed our
19 reply brief. Last Thursday for the -- we received letters,
20 each of us, with extraordinary requests. In the case of Vale
21 with the statement that the whole Vale-BSGR relationship was a
22 product of fraud and corruption and, therefore, the plaintiffs
23 were compelled to ask for everything.

24 Your Honor might ask, and I think your Honor has
25 asked, what happened in the interim, in that two-week time

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1 period. The answer, your Honor, and I think this is telling in
2 terms of the issues before your Honor, is one week after the
3 statement was made by the plaintiffs to us, none of us heard
4 anything from the plaintiffs about this.

5 With respect to Vale, it was not until after we had
6 the -- we filed our reply brief that the plaintiffs first said,
7 well, no, they're not seeking just what was produced to the
8 government. They're seeking something far more expansive.

9 With respect to Thiam, Thiam didn't hear anything
10 whatsoever in that time period from when the opposition brief
11 was filed until last Thursday.

12 And with respect to BSGR, they heard something on the
13 20th before that opposition brief was filed. They made a
14 request to the plaintiffs and a suggestion. They heard on the
15 23rd that the plaintiffs were considering it, and then they, my
16 understanding is, that the first time they heard that a
17 consideration, that Rio Tinto was not only considering it but
18 teeing up the issue before your Honor, was last Thursday late
19 in the day.

20 Your Honor, you know, fundamentally, it's fine for
21 parties to tee up legal issues in advance of a hearing before
22 the Court and for the parties to be prepared to address those
23 issues and to argue them. That's what we understood the
24 process was to be. Your Honor, the process has been perverted,
25 and that has been a substantial prejudice to all of the

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1 defendants here.

2 Getting a letter at 10:30 at night on a Thursday
3 teeing up legal issues that where the other side has said they
4 still want to talk, that's not fair. It's just fundamentally
5 not fair. And your Honor might request briefing from us, your
6 Honor might request argument from us with respect to those
7 issues, but on behalf of all the defendants -- we don't agree
8 on very much. We're fighting with each other on most of the
9 issues on this case.

10 The one thing that we do agree on and feel very
11 strongly about, is that the way that the plaintiffs have
12 conducted this case has worked to our substantial prejudice,
13 and we'd like opportunities to address issues in orderly ways.
14 Sending letters late on Thursdays, after saying for a long
15 period of time discovery presents no burden, is not the way
16 that we would expect litigants before your Honor to act.

17 THE COURT: All right. Let's set a procedure.

18 MR. LYTTLE: May I be heard briefly, your Honor?

19 THE COURT: Very briefly.

20 MR. LYTTLE: Very briefly. It is really stunning that
21 Mr. Liman would articulate this position when we wrote
22 explicitly a letter and said: Hi, there are issues we'd like
23 to bring up with Judge Peck. You asked us to move things
24 forward. These are issues that we feel we are at an impasse
25 at. Please let us know if you agree or disagree. That is

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1 enlightening.

2 Everything that Mr. Liman said can be contradicted if
3 we wanted to show your Honor tit for tat. We don't think it's
4 in your Honor's interest or in this court's interest.

5 Everything that we have filed on, we said we believe we're at
6 an impasse. If you disagree, let us know. They wrote back and
7 said we agree, we are at an impasse.

8 We then proceeded, as your Honor requested.
9 Mr. Steinmetz -- Mr. Steinmetz has refused -- the meet and
10 confer lasted for about half an hour and he says, you're not
11 getting anything because you don't get agents and you don't
12 get --

13 THE COURT: Okay. I understand that. Let's set a new
14 rule that the agenda letters come in a week in advance unless,
15 by mutual agreement, you cut that deadline back, but that way,
16 if you're doing unilateral letters, a week in advance, and then
17 three days after that, the other side can submit their papers.
18 If that means you have to be more prepared for whatever the
19 conference is, so be it.

20 Now, one other question, and I know there was this
21 dancing about whether there was a grand jury or any of that,
22 but I guess one question is, do you want to take them up on the
23 proposal they made? Which is to say, phrasing it in whatever
24 hypothetical to preserve grand jury secrecy, here's
25 hypothetically what we gave the government. Leave me alone for

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1 anything else, at least for now. Is that anything any
2 defendant wants to do?

3 MR. LIMAN: Let me confer.

4 (Pause)

5 MR. LYLE: Your Honor, if we could just clarify what
6 we were discussing with respect to the grand jury materials and
7 the materials for the government, before we get too far down
8 the path. What we were suggesting --

9 THE COURT: Let me ask you to wait a minute so that
10 Mr. Liman can hear you.

11 MR. LYLE: Yes, your Honor.

12 (Pause)

13 MR. LIMAN: Your Honor, we would be prepared to
14 produce -- hypothetically assuming that there is a grand jury
15 investigation, we would all be prepared to produce what has
16 been produced to the grand jury.

17 MR. LYLE: Your Honor, the point that we were making
18 with respect to the materials that were -- we were asking for
19 and the discussion we were having with respect to the documents
20 that the defendants are turning over to the U.S. Attorney for
21 the Southern District of New York, was to point out that there
22 would be no prejudice for them to begin collecting documents
23 and producing documents to us.

24 Our point was, is that they produced documents in some
25 form or fashion to the government, and we would be receptive to

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1 receiving those. What our proposal or our discussion about was
2 never intended to mean that if our requests are broader than
3 what the government has received, that we were foregoing our
4 other requests. That was never what we were suggesting in any
5 of our discussions or in any of our papers.

6 So while it's true that if the defendants are, and we
7 believe they are, producing documents to the government, that
8 they can at least begin turning those materials over to us
9 right now.

10 The remainder of our requests, the ones that we've
11 been writing to your Honor about to get assistance from, remain
12 pending. And we don't want to suggest that we were somehow
13 trying to limit that what we want and what we need for our case
14 is necessarily just what they produced to the government.

15 THE COURT: Well, then, you're not giving them
16 anything for going that route, and I think Mr. Liman is about
17 to point out to me the exact phrase you used in your briefing
18 on the stay.

19 So, Mr. Liman, since I don't have my stay briefs in
20 front of me and you have Post-its and highlighting on yours,
21 that's about all I can see from this distance, but yes, go
22 ahead, read it.

23 MR. LIMAN: The information -- this is, your Honor,
24 from Page 10 to 11 of their brief:

25 The information sought by the outstanding discovery

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1 requests is the same type of information the defendants likely
2 already have collected and produced or will produce to the U.S.
3 and other authorities. There is absolutely no additional
4 burden associated with the providing of discovery defendants
5 likely already have started. All defendants have to do is to
6 turn over what they have collected in response to the various
7 governmental investigations. The ease of replicating these
8 productions weighs against defendants' request for a stay.

9 There are other statements to the same effect in their
10 papers.

11 MR. FILARDO: Good morning, your Honor. If I may be
12 heard. Vincent Filardo for the defendants BSGR and Benjamin
13 Steinmetz. Just to be clear, to my knowledge, your Honor, the
14 U.S. government has not asked my client for documents or issued
15 us a subpoena.

16 What we did initially, very early on, was undertake a
17 document preservation exercise, and that's the 20.6 terabytes
18 or 20.7 terabytes that we've written about, and the issue for
19 us is processing that data. As your Honor well knows, that's
20 where the cost is, and it depends upon the actual tool that you
21 use. And the tool that's appropriate to use is determined by
22 whether or not you have flexibility with the custodians that
23 you're going to look at and whether or not you have an
24 agreement on search terms and the actual scope.

25 We're talking a tremendous amount of data. It could

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1 be far in excess of 3 million bridge pounds to process that
2 kind of data, and that's really where our impasse has been.
3 Let's focus on if we're going to have an agreement on the
4 broadness of what jurisdictional discovery is required for here
5 in New York, their view is that it's not much different than
6 substantive discovery.

7 And, certainly, we're not going to agree to that
8 without judicial intervention and review. And if we're unable
9 to agree with that, we're going to be taking a shot at doing
10 some kind of document processing that may well be with the tool
11 that's not going to be as efficient as another may be if that
12 scope changes. That's really what our argument is.

13 If we we're going to sit down and say what search
14 terms, I'd say New York, Manhattan, but even that would get a
15 whole huge universe of documents that we would then have to
16 review. So that's, in a nutshell, where we are with them, and
17 where we haven't been able to make any progress.

18 THE COURT: All right. Mr. Summit?

19 MR. SUMMIT: Your Honor, we have not produced anything
20 to this hypothetical grand jury, and so we're not in this
21 issue.

22 I do want to just suggest to your Honor that I need a
23 few more minutes of your Honor's time on this month deadline,
24 as I've been talking -- thinking about it and conferring with
25 Ms. Abravanel. Maybe now is the moment or sometime later.

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1 THE COURT: I'll hold that for a moment.

2 MR. SUMMIT: Thank you, your Honor.

3 MR. LIMAN: Your Honor, in response to that
4 hypothetical grand jury, we would have documents to produce.

5 THE COURT: All right. Any reason, Mr. Liman, why you
6 shouldn't produce those, and then the Court can see whether
7 that is enough for all purposes, enough in the interim,
8 et cetera? I mean, since they don't know what the government
9 is asking for and what you have produced, despite what they've
10 said in their brief, I'm not inclined to say they can never ask
11 you for anything else, but, you know, if they don't want a stay
12 in the interim, they said that's pretty good for the short
13 term.

14 MR. LIMAN: Your Honor, if it would resolve for the
15 moment the issues with respect to their request to us, well, we
16 think we do have a valid objection. We would not stand on that
17 objection.

18 MR. LYLE: Your Honor, Michael Lyle for the plaintiff.
19 Your Honor, the idea, then, that we've already heard from two
20 of the defendants, that they haven't produced anything --

21 THE COURT: Limit yourself to the one defendant who
22 hypothetically said they did.

23 MR. LYLE: What we said in our papers, your Honor, is
24 that the information that we were requesting is the same type
25 of information, not that it is identical, that it is limited to

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1 the same scope.

2 THE COURT: You're making a very good argument for a
3 stay.

4 MR. LYLE: We don't -- your Honor, but what we're
5 suggesting is is that we know that they've already gone to
6 their documents, begun identifying for the government, who has
7 an investigation going on about the identical issues in our
8 case. We don't know what they've given to the government. We
9 don't know what the government's asked them for because we're
10 not privy to that information. So we can't say that our
11 materials are identical that we're asking for.

12 What we can say is we know that they've already given
13 something, and Mr. Liman has now confirmed that they've given
14 something, and we're certainly happy to take that information.
15 What we were suggesting is, there's no burden there because
16 they've already done it. To the extent that they've held back
17 information that they've looked at and collected that is
18 responsive to our requests, that they haven't turned over to
19 the government, we would be entitled to that.

20 Our point was there's no burden on them because
21 they've already initiated some kind of process relative to many
22 of the issues.

23 THE COURT: There is a big burden in going from, you
24 know, let's see what's there and/or let's produce what the U.S.
25 Attorney's Office has demanded, and let's now answer all of

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1 your discovery requests, to the extent that they're different.
2 So you can't have it both ways.

3 I will require Mr. Liman's client to produce what it
4 hypothetically produced to the government, in short order.
5 Mr. Liman, you tell me what short order is, and we will see how
6 much more you need after that, which may have an impact on the
7 Court's ruling on the stay. If it's very little, then what you
8 said originally holds. If it's, this is a nice start and we
9 got all these goodies that we didn't even ask for, so now we're
10 going back to our original requests, et cetera. So how soon
11 can you produce, Mr. Liman?

12 MR. LIMAN: Your Honor, two weeks.

13 THE COURT: Okay.

14 MR. LIMAN: I may have made a colleague unhappy, but I
15 think two weeks will do it.

16 THE COURT: Good. All right. Let me go back to
17 Mr. Summit.

18 MR. SUMMIT: Thank you.

19 THE COURT: Who's going to plead for a little more
20 time.

21 MR. SUMMIT: I think I made my colleague over there
22 very unhappy. Thinking about the month and what we're going to
23 get done and what we can get done within that month, your
24 Honor, we need to agree on search terms with plaintiff, and we
25 will propose search terms. We will attempt to conduct the

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1 search, and thereby have a corpus of documents.

2 We don't know -- I don't know as I stand here today
3 whether that will mean a thousand documents or 50,000 documents
4 or 150,000 documents. I do know that many, many, many of them
5 will be in French. I do know that they have to be reviewed for
6 privilege and all the rest.

7 So what I would ask, your Honor, is that we continue
8 to meet and confer. If I may just --

9 THE COURT: That, I'm not allowing because that seems
10 to get us nowhere.

11 MR. SUMMIT: In a month, we will commit to your Honor
12 that we will have proposed search terms, and we will have
13 identified a Guinean authority, and we will begin --

14 THE COURT: The month deadline sticks.

15 MR. SUMMIT: Your Honor.

16 THE COURT: And, one, you know, other than privilege
17 and at least the attorney-client privilege review can largely
18 be done by keyword search, for the names of lawyers and
19 extensions.

20 Now, I don't know what the governmental privilege are.
21 You've had six months to come up with a lawyer who can advise
22 on that, and even if you have to hold stuff back as this may be
23 privileged, it may not, we're not sure, the only way to get
24 through the 200,000 e-mails, however you do it, is to have a
25 deadline. So how soon can -- Let's maybe even break it down

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1 into baby steps.

2 MR. SUMMIT: Good.

3 THE COURT: How soon can you propose keywords to the
4 plaintiffs?

5 MR. SUMMIT: I think in a week.

6 THE COURT: Because of testing or because -- you know,
7 look, if you're just picking the key words out of thin air,
8 which isn't the way to do it, then do it today. If you're
9 actually going to test the keywords -- which you should read
10 the William A. Gross decision, if nothing else, and it's cited,
11 I believe, at the back of my chambers procedures.

12 If you're actually going to test the keywords and see
13 what they hit and things like that, then, yes, you need a
14 little more time. But, you know, if you take three weeks to
15 make a keywords proposal to them and they take equally long to
16 get back with much less information, we're nowhere.

17 MR. SUMMIT: Well, I suggested a week.

18 THE COURT: Okay. So if you get them the keywords by
19 November 10th, your proposal, how soon can you respond?

20 MR. LYTTLE: Two days, your Honor.

21 THE COURT: Good. So that's November 12th. You then
22 have the choice of agreeing to their suggestions or taking your
23 chances. I'm not going to hold your hands on all of this. So
24 if you've got your keywords in hand roughly by the 12th or the
25 14th, that still gives you three weeks, albeit one of them is a

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1 short week because of Thanksgiving.

2 MR. SUMMIT: But, your Honor, what if these keywords
3 yield 100,000 documents, 90,000 of which are in French?

4 THE COURT: Then, you know, the answer, and you
5 probably should be arranging this upfront, is to get a team of
6 contract attorneys, whether from a vendor or from a staffing
7 agency, who speak French.

8 MR. SUMMIT: Your Honor, I don't want to come back
9 here in a month with a lot of excuses and failure, and I want
10 to be realistic with you today.

11 THE COURT: So what's your realistic, now, knowing
12 that it's French and, frankly, unless the e-mails are highly
13 responsive to the richness of 50 percent, you really shouldn't
14 have 100,000 e-mails to look at, but --

15 MR. SUMMIT: Well, the discovery requests, as defined
16 still by plaintiff, are extraordinarily broad.

17 THE COURT: You're also claiming poverty, and to a
18 certain extent, other than privilege, produce it all. You
19 know, do what you need to do. Tell me what it is that you
20 think is a realistic deadline.

21 MR. SUMMIT: What I would like to suggest, to your
22 Honor --

23 THE COURT: No, a completion deadline.

24 MR. SUMMIT: By completion deadline, you mean complete
25 production of all documents?

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1 THE COURT: Of whichever of the 200,000 are
2 responsive.

3 MR. SUMMIT: I would have to ask then for three months
4 because we haven't --

5 THE COURT: Okay. Then your credibility is gone, and
6 it's December 12th and that's it. So you bought yourself nine
7 days. Get it done.

8 MR. SUMMIT: Your Honor.

9 THE COURT: No, no, no. Stop. Three months for
10 200,000 e-mails is absurd, even if they're in French. Hire a
11 good vendor who understands French. Do what you have to do.
12 You're not getting three months. December 12th is the
13 deadline.

14 Now, okay, so we've taken care of Vale, I think at
15 least for the moment. So now we're back to BSGR and Steinmetz.

16 MR. LYTTLE: Your Honor, one point on Vale. If this
17 hypothetical government production, it would be very helpful
18 for us in evaluating it, if Mr. Liman could provide us with the
19 custodians they searched, the dates that they searched. I
20 understand he can't provide us the government request, but I
21 think that information would not be subject to grand jury
22 secrecy. That would help give us a sense of what this data is
23 and where it came from.

24 THE COURT: Any problem with that?

25 MR. LIMAN: I'm not sure what I'm being asked, your

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1 Honor. I think if the question is to provide information right
2 now, I don't know the answer to that.

3 THE COURT: No, no. When you make your production,
4 what was the date range parameter of the search, and what were
5 the custodians whose files were searched?

6 MR. LYTTLE: And the search terms.

7 MR. LIMAN: Your Honor, I do think there is
8 potentially an issue with respect to that. One of the things
9 that the parties have agreed upon is not to produce the actual
10 government request that led to the production of documents
11 because that would intrude into the secrecy of the grand jury
12 and the U.S. Attorney's Office processes.

13 I would be hesitant to make that commitment in front
14 of your Honor without having some sense as to whether it would
15 implicate those issues. I think it does.

16 THE COURT: All right. Well, we'll leave it for now
17 as something that you and plaintiff's counsel can discuss and
18 see where that all works out. Okay. BSGR and Steinmetz.

19 MR. LYLE: Your Honor, Michael Lyle for plaintiff.
20 Your Honor, the issues with respect to Mr. Steinmetz are really
21 focused on three areas. First, there are documents that
22 Mr. Steinmetz and BSGR agreed are responsive and that they
23 would have no objection to producing, but they haven't produced
24 them. And we'd like to have --

25 THE COURT: All right. Let's get a date for that,

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1 assuming that's true. I just saw a head shake.

2 MR. FILARDO: No, your Honor, it's not true. What
3 Mr. Lyle is referring to is our responses to discovery requests
4 whereby we responded subject to general objections, which
5 included our scope objections, and maybe others.

6 In fact, it said if they weren't privileged and they
7 exist, we would produce them. And that was in accordance with
8 the prior procedure that we agreed with plaintiff was that we
9 will agree upon the scope of discovery and only then would we
10 then discuss the appropriate custodians and search terms.

11 So it's not like we agreed, and we just failed to
12 produce, as it seems to be being suggested to the Court. It's
13 not that at all.

14 THE COURT: All right. So let's deal with scope.

15 MR. LYLE: The issues, your Honor, that Steinmetz has
16 asserted are twofold, and the real impasse relates to what it
17 is that we're entitled to receive from them. We are seeking
18 contacts, your Honor, more broadly than Steinmetz and BSGR are
19 agreeing to.

20 They are trying to suggest that we are only limited to
21 contacts with New York in order to establish the personal
22 jurisdiction. Our requests are targeted in two areas, agents
23 and co-conspirators, which provide for information in discovery
24 relative to --

25 THE COURT: What are we talking about as to agents and

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1 co-conspirators?

2 MR. LYLE: So we're talking about all of the other
3 co-defendants.

4 THE COURT: Now, that's proving your case through the
5 back door.

6 MR. LYLE: Well, your Honor --

7 THE COURT: You may get it later. You're not getting
8 it now.

9 MR. LYLE: Well, the contacts with respect to the
10 co-conspirators go directly to the questions of the long-arm
11 jurisdiction, which we have asserted in the complaint and which
12 is also allowed under federal rule 4K2. And so our contacts
13 with respect to them is focused on those personal jurisdiction
14 issues.

15 THE COURT: That is basically the merits; is it not?

16 MR. LYLE: But, your Honor, we recognized when you
17 were with us last time and you picked up on this point, that
18 there may be some limited overlap.

19 THE COURT: There's a difference between limited
20 overlap and every substantive document that BSGR and Steinmetz
21 have because, in your view, it shows what they and/or the
22 co-conspirators did.

23 So I understand lines have to be drawn, and it may not
24 be perfect, but at the moment, let's take a very classic
25 jurisdiction and let's focus on that first.

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1 What actions, if any, did BSGR, Steinmetz and any
2 direct employees or direct agents, which probably aren't any,
3 what contact did they have with New York or the United States.

4 MR. LYLE: Well, your Honor, with respect to agents,
5 we have alleged that Mr. Cilins is an agent of BSGR and so --

6 THE COURT: Who's Mr. Cilins?

7 MR. LYLE: Mr. Cilins is one of the co-defendants in
8 the case, who is the one that's in prison right now in
9 connection with his crimes that are the subject of this lawsuit
10 and also the government's investigation.

11 So we would ask that we have at least the opportunity
12 to have discovery with respect to Mr. Cilins, who is
13 specifically alleged as an agent of BSGR.

14 MR. FILARDO: Your Honor, I would say, why doesn't the
15 plaintiff take discovery of Mr. Cilins? I mean, it's our
16 position he's not our agent. I think that will come out if the
17 merits of this case are ever tried or adjudicated. Take
18 Mr. Cilins' discovery. They've had that opportunity for many,
19 many months now. I mean, he's not going anywhere, at least
20 until January when I understand he'll be released, and at that
21 point, he'll probably go back to his home country.

22 THE COURT: How many of the however many million
23 gigabytes, I'm exaggerating, but how much do you have about
24 Cilins and contacts with New York or anywhere in the U.S.

25 MR. FILARDO: Your Honor, I can't respond with respect

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1 to the 20.6 terabytes, but based on discussions with my client,
2 I doubt -- we have very little, if much, contact with New York
3 and the U.S.

4 The whole Cilins thing, I'm not sure. We would need
5 to process some key custodians, then test some search terms, as
6 your Honor suggested earlier, and then we can determine. But I
7 really would think that it's the actual processing and then the
8 testing that's takes the time, and then the review, obviously,
9 after that. If we chose the right search terms, maybe the
10 review won't be as long.

11 THE COURT: Right. Well, keep Mr. Cilins in for now.

12 MR. LYLE: Your Honor, the second issue is relative to
13 the contacts with the United States as a whole, that BSGR and
14 Mr. Steinmetz have. They, again, seem to limit it only to
15 New York. Under Federal Rule 4K2, we're entitled to discovery
16 with respect to contacts with the United States or abroad.

17 MR. FILARDO: Your Honor, they didn't plea 4K2 in
18 their complaint nor -- and Judge Wood in a recent decision has
19 really said that that's just not a proper way to go about
20 trying to get jurisdiction over a defendant in the U.S. by
21 looking at the activities of co-conspirators everywhere.

22 THE COURT: We have the co-conspirators. What's BSGR
23 and Steinmetz's contacts with the rest of the United States?

24 MR. FILARDO: Very little, if any, your Honor.

25 THE COURT: Good. Then it shouldn't be a burden to

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1 produce.

2 MR. FILARDO: Production is not the burden, your
3 Honor.

4 THE COURT: I understand.

5 MR. FILARDO: It's the review and the process.

6 THE COURT: You're going to have to figure out how to
7 review it and that's, frankly, the same whether it's New York
8 or the entire United States.

9 MR. FILARDO: Yes. And, your Honor, one way, and I
10 think it's the appropriate way, too, which the plaintiff has
11 not moved on as well, it's not just the substance of the
12 request that we're now discussing here, but the timing.

13 So, for example, when they're pleading general
14 jurisdiction against Mr. Steinmetz or BSGR, that timing is on
15 or about the day that the complaint is filed. When they're
16 pleading specific jurisdiction under New York alone, it's keyed
17 to the actual specific allegations that give rise to the claims
18 that are in the complaint, and those are all delineated in very
19 specific time periods, not very long, your Honor.

20 But instead, they want it through -- going back to
21 January 2008. It increases the amount of data tremendously.

22 THE COURT: Mr. Lyle?

23 MR. LYLE: Our allegations in the complaint, your
24 Honor, go to 2008 through to the present, your Honor.

25 THE COURT: I know, but isn't the test for personal

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1 jurisdiction at the time of the complaint?

2 MR. LYLE: Yes.

3 THE COURT: In other words, you know, somebody could
4 live in New York at the time -- I mean, obviously, at the time
5 they committed the tort, that gets into another part of the
6 statute but, you know, the issue is, is it fair to bring them
7 into court at the time of the suit?

8 MR. LYLE: Your Honor, the contacts are if you engage
9 in conduct, as you're pointing out, so in some instances it
10 does focus on the time of the complaint, but with respect to
11 the commission of the tort through an agent, you look at the
12 context at the time of the action, not at the time of the
13 lawsuit. And so under the long-arm statute, you must look at
14 time of the allegations in the complaint.

15 THE COURT: All right. But if we're talking long arm,
16 it's got to be context in connection with the allegations of
17 the complaint.

18 MR. LYLE: Yes.

19 THE COURT: Not, you know, did they do business in
20 New York sporadically, you know, that would allow someone else
21 to have 302 long-arm statute. So what is it you are saying
22 that they did in New York or the U.S. in connection with the
23 RICO, et cetera, claims?

24 MR. LYLE: Your Honor, with respect --

25 THE COURT: Directly, not through an agent, other than

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1 Cilins.

2 MR. LYLE: With respect to Steinmetz and BSGR, your
3 Honor, our allegations are that -- that his conduct through --
4 we have to remember, we have him funneling money through the
5 United States, in banks located in the United States and in
6 New York, those are allegations.

7 We have allegations that Mr. Steinmetz sent his agent,
8 Mr. Cilins, to the United States to continue the coverup of the
9 conspiracy through the use of bribery to defendant Thiam -- to
10 defendant Toure, rather.

11 Mr. Steinmetz, we have allegations -- and let me be
12 clear, your Honor. With respect to defendant Toure, Mr. Cilins
13 came to the United States, and for these actions he was
14 arrested and is in prison for it. The bribery that he was
15 engaged in was at the direction and control of BSGR, and it
16 with was for the purpose of covering up the bribes that were
17 given to Toure in connection with the RICO conspiracy. Bribes
18 which are documented, your Honor, through written agreements of
19 all things.

20 THE COURT: What do you need more discovery for?

21 MR. LYLE: Because, your Honor, Mr. Steinmetz has told
22 us he's contesting personal jurisdiction, and so we need to get
23 discovery to show that -- we don't know what other contacts are
24 that he has, but that's an example. The time periods we're
25 talking about, your Honor, are laid out in our complaint, but

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1 what I'm suggesting is perhaps what we can do is, we have two
2 agents, we have Mr. Cilins, who I mentioned. We also have
3 Mr. Furfano, who is another agent of Mr. Steinmetz's, who is
4 also part and parcel sell of the ability to -- is part of the
5 RICO conspiracy, helping funnel money and in connection with
6 the contacts that BSGR had with defendant Thiam, who is here in
7 New York.

8 What I'm suggesting is perhaps what we can do is work
9 out a way for us, with Mr. Filardo, to talk about Mr. Cilins
10 and Furfano and propose date ranges for him to search because
11 he has this vast database that he's talking about that he's
12 concerned about.

13 I think if we can come to him with dates, names and
14 search terms, and see what he comes out by also running some
15 deduping against that, because I suspect that some of that, if
16 we run search terms and dates against the data and dedupe it,
17 we're going to reduce the volume of documents that they have.

18 And I think if we can do that, your Honor, we can
19 prepare something within the next couple of days to give to
20 BSGR and Steinmetz, and then see if that reduces his vast scope
21 of material.

22 THE COURT: Mr. Filardo, does that work?

23 MR. FILARDO: First, Mr. Furfano is not alleged in the
24 complaint. I really don't know who he is. I object. My
25 client has no idea what plaintiff is referring to. Obviously,

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1 the allegations of bringing money through the United States, if
2 they even exist in the amended complaint, they're very, very
3 conclusory.

4 Second, the activities of Mr. Cilins, as you point
5 out, your Honor, they are alleged in some detail in the
6 complaint. Those activities occurred allegedly in Florida.
7 There's no allegation of a harm occurring in New York. They
8 don't even fit under New York's long-arm statute.

9 They also occur in a short period of time, I think
10 it's three or four months, in 2013. I'm really -- you know,
11 I'm kind of at a loss to say, other than this just seems like a
12 classic fishing expedition to me with respect to this
13 particular defendant and this other individual that they're
14 raising now.

15 Frankly, if we had the opportunity to have this kind
16 of a discussion prior to coming into court, we may have been
17 able to work something out that wouldn't have us in front of
18 your Honor right now. But here we are, and we have -- if this
19 is an opportunity where it's an appropriate review of
20 discovery, this is something we may be able to work out. But,
21 you know, I'll leave it at that.

22 THE COURT: All right. You know, it really would have
23 been nice if this had occurred before. The whole thrust of
24 your letter is defendants wouldn't give you anything. Now,
25 you're giving stuff to them, which is fine. I don't care which

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1 way it goes. Let's get this done. How soon can you give them
2 your search list and times?

3 MR. LYLE: Your Honor, we can have them to them by
4 this Friday.

5 THE COURT: Okay.

6 MR. FILARDO: Once I get that search list, your Honor,
7 if I get it on Friday, it's the end of the week, I'd need some
8 time to talk with our electronic discovery vendor, select the
9 appropriate -- what I think would be the appropriate custodians
10 to do some testing. We can come to agreement on the search
11 terms, and then see if that will work. You know, at that
12 point, I can probably get that done in another week, your
13 Honor.

14 THE COURT: All right. So why don't we get a report
15 from all of you by Monday, the 17th, preferably a joint report,
16 preferably one that says we've worked it all out; we don't need
17 to bother you, judge. But, more likely, two separate reports,
18 and at some point before Thanksgiving I'll deal with all of
19 you.

20 MR. LYLE: Thank you, your Honor.

21 MR. FILARDO: Thank you, your Honor. All right. What
22 else?

23 MR. LIMAN: Your Honor, Vale has a number of requests
24 with respect to our discovery as to Rio Tinto. I can address
25 each of those, if you'd like, your Honor.

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1 THE COURT: Okay.

2 MR. LIMAN: The first, your Honor, is briefed at pages
3 3 to 6 of the joint letter to your Honor on Thursday. They
4 pertain to Vale document requests 20 and 23.

5 THE COURT: Okay.

6 MR. LIMAN: Request No. 20 calls for documents
7 relating to any information shared by Rio Tinto with any third
8 party, other than Vale or its representatives, including but
9 not limited to the government of Guinea or its representatives
10 from February '97 to April 2010, relating to, and then it lists
11 the items as to which the plaintiff claim that Vale
12 misappropriated the information.

13 Request No. 23, your Honor, calls for all documents
14 relating to the highly confidential and proprietary information
15 regarding the Simandou Concession that Rio Tinto allegedly
16 shared with Vale, as described in paragraph 56 and 57.

17 THE COURT: Let me cut to the chase. Why can't the
18 plaintiff do a better job of identifying what the trade secrets
19 are here?

20 MR. LYTTLE: Your Honor, this is -- we have identified
21 this in two-ways. This is a data room that contains categories
22 of information. We've told them very specifically the types of
23 information we believe were taken, and we've also told them the
24 things we're willing to exclude. But each category has a
25 number of documents that contain different pieces of

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1 information.

2 We don't know what defendant Vale shared with its
3 co-conspirators. We can't point to a single document and say
4 that's it. That's the one you shared, but we can't --

5 THE COURT: My problem seems to be that what was in
6 the data room, at least according to Mr. Liman's letter, was so
7 broad and the exclusions are so minor, that it's basically
8 anything and everything about everything.

9 MR. LYTTLE: That's just not correct. We focused in
10 on geological data, rail and transport plans, and mining data.
11 That's what we focused in. Each of those categories --

12 THE COURT: Isn't this a mining company? So isn't
13 that like saying anything about the business?

14 MR. LYTTLE: No, because it's mining data about
15 Simandou. They have not done any work on Simandou. So any
16 work in their files relating to mines made on Simandou
17 necessarily came from us. And to the extent they did work
18 after they did the joint venture, we're entitled to see how
19 that independent work they supposedly did reflects our data.

20 MR. LIMAN: Your Honor?

21 THE COURT: Mr. Liman.

22 MR. LIMAN: If I might pass up, we put together the
23 information from the plaintiffs with respect to the data room.

24 Your Honor, this is an excerpt from the index to the
25 data room provided to us by the plaintiffs, limited to the

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1 documents with respect to Simandou.

2 Those items that are in orange on the left side, are
3 the items that have been excluded by the plaintiffs. The items
4 on the -- that are in white have not been excluded by the
5 plaintiffs. There are well over a hundred documents. If you
6 look at the fourth column, that refers to the number of pages.

7 The documents refer to information regarding
8 financials, information regarding geology, information
9 regarding ports, information regarding the quality of the iron
10 ore.

11 Contrary to what plaintiffs just told you, there was
12 extensive information in the public domain about Simandou.
13 Simandou was publicly considered to be one of the most
14 promising sources of high-content iron ore. That was publicly
15 known. That was told to the world by the plaintiffs and by
16 others. Most mining companies in the world looked at Simandou.

17 And, your Honor, I would just note we cite cases in
18 our letter that are directly on point. Referring to the
19 magistrate judge's opinion in the Switch case, which we cite,
20 the same argument was made there that the plaintiffs make here.
21 The plaintiff there said that they identified the categories of
22 alleged trade secrets and that was sufficient. The Court says
23 this answered most identified categories of trade secrets, but
24 did not describe the trade secrets themselves. And that was
25 considered to be insufficient.

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1 And another instance in that case, the Court pointed
2 out the disclosure does not specify any trade secrets at all
3 but, rather, reveals the end results of the trade secrets.

4 As we've informed the plaintiffs, we, as lawyers, have
5 not been able to identify any of these documents that are
6 listed. The request calls for us to look for the data that is
7 contained within hundreds and hundreds of pages of documents.

8 We've been sued. The complaint has been outstanding
9 for months. These are serious allegations of misappropriation.
10 It should -- they should have done the investigation. We're
11 entitled to know what it is they say we stole.

12 MR. LYTTLE: Your Honor, we have identified, as best
13 we can, what it is we believe they stole. This is not a case
14 where we can point to a piece of source code, which is all the
15 cases they have cited, where we can say, that's it, that's what
16 they took. Go search for that source code. This is subject
17 information and while Simandou was probably the main areas, the
18 level of information, the detail of information, the
19 confidentiality of information that Vale was exposed to is not
20 in the public domain.

21 THE COURT: I guess what I'm trying to figure out is
22 when you've got a broad category like this, or categories, how
23 it is that you expect Mr. Liman, who presumably is not a mining
24 engineer, to figure out what it is to produce.

25 MR. LYTTLE: I think one option we might have is we

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1 have uncovered data logs, which show which Vale employees
2 accessed what, how many times they accessed, what they
3 accessed. Perhaps what we could do to address Mr. Liman's
4 concerns is come back and say, okay, it's these documents and
5 these custodians.

6 THE COURT: Well, certainly limiting the custodians
7 limits things and limits the search. You know, if you've got
8 that John Watson looked at one document, that it's about, you
9 know, the categories of iron ore, or something, that might give
10 a specific enough item for searching. If it's, on the other
11 hand, a 50-page report and then there are 50 of those, it
12 becomes unmanageable.

13 So why don't you identify that the way you've
14 described it, what custodians, what documents, what time
15 period. I assume we're talking a very limited time period
16 thereafter. And see if that's a manageable search approach.
17 If it is, it is. If it isn't, it isn't. When we get to the
18 merits, there may be more of a requirement for identification
19 of the trade secret. At the moment --

20 MR. LYTTLE: On the time period, your Honor, I think
21 while they may have accessed it for a limited time period, we
22 would be entitled to know how they used that after they
23 accessed it.

24 THE COURT: For a limited time period. After that, if
25 they were involved in the joint venture, et cetera, they would

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1 have been getting information from other sources, and it gets
2 very complicated. Keep it limited, to begin with, and we'll
3 see.

4 MR. LIMAN: So, your Honor, we're talking about the
5 documents that Rio Tinto is going to produce to us, which I
6 understand is the logs. We would also ask that they produce to
7 us copies of the documents from which they contend trade
8 secrets were taken. Right now -- I think, your Honor, we and
9 you are at a handicap, frankly, in judging our motion
10 because --

11 THE COURT: So you're going to have --

12 MR. LIMAN: We don't know what these documents are.
13 We do know that there are hundreds of pages of documents from
14 descriptions --

15 THE COURT: All right. I got the point. Do you have
16 these documents?

17 MR. LYTTLE: We have the documents.

18 THE COURT: Any problem with producing --

19 MR. LYTTLE: No.

20 THE COURT: -- whatever limited set you're going to be
21 using to claim that they -- individual employees accessed and,
22 therefore, stole from those documents?

23 MR. LYTTLE: There's no issue with that. I think the
24 problem is going to be -- I don't think we should be forced --
25 if the documents contain similar information, to guess which

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1 one is appropriate and the limited part is the part that I'm
2 struggling with. And I'd appreciate your Honor's guidance with
3 that. We can't say if two documents contain the same
4 information, we shouldn't be forced to guess Valle
5 misappropriated out of this one, and it turns out they
6 misappropriated --

7 THE COURT: If you're talking two documents that are
8 the same. That's one thing. If you're going and saying it
9 could be anything that was in the data room, that's much too
10 broad for anyone to get a handle on. Limit it, as best you
11 can, and that will limit the scope of your claims accordingly
12 and discovery to match with it.

13 MR. LYTTLE: Will do. Thank you, your Honor.

14 MR. LIMAN: Your Honor, with respect to that, can we
15 have a deadline for when we're going to get the documents?

16 THE COURT: Yes.

17 MR. LYTTLE: The actual production of the documents?
18 We need time to look at them ourselves and attempt to narrow
19 our terms.

20 THE COURT: Give me a date.

21 MR. LYTTLE: A month, three weeks?

22 THE COURT: What's the least you can do it in?
23 Because, you know, you want speed except when you have to do
24 something.

25 MR. LYTTLE: No, understood, your Honor. I think we

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1 want to be very careful in doing this and looking at them very
2 carefully.

3 THE COURT: All right. Three weeks.

4 MR. LYTTLE: Thank you.

5 THE COURT: Which is the Monday before Thanksgiving.
6 Okay. Next?

7 MR. LIMAN: The next issue, your Honor, is addressed
8 at pages 7 to 9 of our letter. Maybe I can cut through this a
9 little bit. This pertains to --

10 THE COURT: Are we dealing with the privilege, or did
11 you skip over that?

12 MR. LIMAN: Your Honor, I think that is right. I did
13 not intend to skip over that. That's Pages 6 to 7 and, your
14 Honor, we passed up a letter this morning correcting a
15 miscitation in our letter filed on ECF. I think we've laid out
16 the grounds in our letter that pertains to the interrogatory
17 that asks for the names and identities, and it seeks
18 information regarding the alleged extensive investigation that
19 was allegedly done.

20 THE COURT: Mr. Lyttle.

21 MR. LYTTLE: Your Honor, as an initial matter, this
22 matter is not ripe. We repeatedly spoke with Mr. Liman and
23 Vale about ways to narrow this request. Putting that issue
24 aside, this complaint was filed in April of 2014. Anything in
25 any investigation between April 10 and April 2014 is not

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1 relevant because we filed within the statute of limitations.

2 The only period with which, if defendants are correct
3 about when the RICO injury occurred, and we don't believe as a
4 threshold matter that they are correct about when the RICO
5 injury occurred, but if they are, and it occurred in December
6 of 2008, the only time period that we need to toll is
7 December 2008 up through April 2010; i.e. four years before the
8 complaint was filed.

9 We're happy to talk with them about turning over the
10 facts of that investigation. All we need to allege is that it
11 was diligent as an investigation. The legal advice is not an
12 issue. So there are two issues are here, what investigation,
13 what time period, and is it just the facts showing the
14 diligence, or are they also entitled, which they are not, to
15 the legal advice stemming from that due diligence and that
16 investigation. These were issues we hoped to continue to
17 discuss. This issue, in our view, is not ripe now.

18 THE COURT: When is it going to be ripe, since
19 everyone likes to kick things down the road?

20 MR. LIMAN: Your Honor, we're prepared to have the
21 conversation with them in the next two days and to bring it in
22 front of your Honor by the end of this week.

23 THE COURT: Just what I wanted, more letters. All
24 right. Promptly work it out, and if you can't, get back to me
25 on it. Right now, I don't think you have any dispute, per se,

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1 since the interrogatories for identity of knowledgeable people,
2 that doesn't negate the privilege, even if there is one. Then
3 the document scope issue, you know --

4 MR. LYTTLE: On the interrogatory issue, we've already
5 identified over 20 people with knowledge of the investigation.

6 THE COURT: Well, you need to say what their knowledge
7 is and not use that as feather bedding; so work it out within a
8 week.

9 MR. LIMAN: Your Honor, while counsel may say they've
10 identified people, that presumably means they've identified
11 conversations within the Quinn firm, but have not told us
12 anything other than, go take a hike. Can we have a deadline as
13 to when we're going to get the interrogatory answer? Maybe by
14 the end of this week?

15 THE COURT: Okay. Did you or didn't you answer that
16 interrogatory? I thought you were saying you did.

17 MR. LYTTLE: I thought, I believe we did, your Honor.
18 I need to double-check I believe we identified people with
19 knowledge. If we've not done that, we can do that with
20 Mr. Liman.

21 THE COURT: Mr. Liman?

22 MR. LIMAN: Your Honor, apparently, they've identified
23 some people. They're withholding others on the grounds of
24 privilege. That's the nature of the dispute.

25 MR. LYTTLE: Thank you.

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1 MR. LIMAN: Names are not privileged. They're names
2 of people.

3 THE COURT: Identify all the people. I don't see a
4 privilege in that, and then work out with Mr. Liman how else
5 you're going to handle the rest of this. If you are going to
6 be withholding documents on the basis of privilege, you're
7 going to have to do a privilege log.

8 So let's put it as a two-week. You'll get back to me
9 all in two weeks. So two weeks from today you'll tell me that
10 either this is resolved, I don't really care how, or that it's
11 not and here is where you all are on it.

12 MR. LIMAN: Should we -- if we have reached an
13 impasse, and hopefully we won't, would your Honor's preference
14 be that we would each put in simultaneous short letters? We
15 can keep them very short, whatever length you want.

16 THE COURT: Even a joint letter perhaps, but that
17 hasn't work so well in the past. Short letter briefing on it,
18 and we'll go from there. Okay.

19 (Discussion off the record)

20 MR. LIMAN: Your Honor, now we're on pages 7 to 9. As
21 indicated in our letter, the plaintiffs have also written us
22 that they believe that this request is no longer -- is not
23 ripe. We believe it is ripe. We think we've gone through
24 discussions and reached an impasse, as we did with respect to
25 the preceding request.

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1 The plaintiffs have said, in the spirit of compromise,
2 they would be prepared to produce documents about Rio Tinto's
3 decision to approach Vale. We would welcome, frankly, any
4 documents from the plaintiff in this case. They are, after
5 all, the plaintiff. But we think that that request does not --
6 that that answer does not satisfy the request. I can argue it,
7 your Honor. I'm cognizant of the hour and the position they're
8 likely to take, which is it's not ripe; so whatever your
9 Honor's pleasure is.

10 THE COURT: Let me hear from them as to why it is not
11 ripe.

12 MR. LYTTLE: I believe this one may be ripe, your
13 Honor. The BHP takeover attempt of our client, there were a
14 number of scenarios looked at in defense of that takeover
15 attempt. The vast majority of those scenarios did not relate
16 in any way, shape or form to Vale; did not relate in any way,
17 shape or form to Simandou. They are not entitled to know every
18 potential asset we looked to sell, every potential suiter we
19 looked at, or assets completely unrelated to Simandou.

20 We have offered to them that we will give you
21 documents that go to why we decided to approach Mr. Liman's
22 client, Vale, about an asset deal.

23 Now, there's one other point on the BHP takeover
24 attempt. If this is really what's driving those
25 investigations, as Vale, that's the position they've taken, I

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1 have a Wall Street Journal article here. The headline is:
2 Death of a Mega Deal, BHP Ends Its Pursuit Of Rio. That's my
3 client, Rio Tinto. That's dated November 26th, 2008.

4 Your Honor, the BHP deal was off the table the day
5 after we opened the data room to them. It is absurd to contend
6 that the BHP deal drove those accusations, and it is equally
7 absurd for the defendants to say that when we continued to
8 negotiate for six to nine months after the BHP deal was off the
9 table. The BHP deal had nothing to do with this. We will give
10 them the reasons behind it. That's relevant. That's
11 discoverable. But we don't need a fishing expedition into all
12 the business opportunities our client looked at completely
13 unrelated to Vale and completely unrelated to Simandou.

14 THE COURT: Mr. Liman.

15 MR. LIMAN: We, obviously, disagree with the statement
16 of facts as counsel addressed them, but let me be more precise
17 in my answer. The claim in this case against Vale is that we
18 fraudulently induced Rio Tinto to sign a confidentiality
19 agreement.

20 That deed is dated -- one moment -- is dated September
21 of 2008. It is explicitly geared to the BHP doing the deal. I
22 can hand up a copy to your Honor, but the critical provisions
23 are of it is that it established a restricted period of time
24 during which Vale could not talk to anybody else regarding the
25 Billiton. There were timetables tied to the Billiton deal.

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1 In essence, the theory of the confidential deed was
2 that Rio Tinto was the subject of a hostile takeover offered by
3 BHP. Vale was one of the other few competitors in the area of
4 strategic buyer -- a strategic buyer potentially for some of
5 Rio Tinto's assets or BHP Billiton's assets that would have to
6 be divested if there was a takeover of Rio Tinto by BHP
7 Billiton.

8 And the proposed transaction, as it was described to
9 Vale, when Rio Tinto first approached Vale, had nothing to do
10 with Simandou. Simandou only came about later on. So the
11 legal question is, were we fraudulent -- did we fraudulently
12 induce Rio Tinto to sign this document in September of '08?

13 Our theory, your Honor, is that Simandou had nothing
14 to do with the plaintiff's decision to sign the confidentiality
15 deed, that it was part of their defensive tactics with respect
16 to a transaction that would have ended Rio Tinto's life as a
17 corporation. And it was a critical -- one of their critical
18 strategies.

19 And why is all of this relevant? I think, your Honor,
20 first, it does entitle us to the strategic discussions with
21 respect to the decision to approach Vale. But, your Honor, I
22 don't think it is limited to that under the case law in this
23 district and elsewhere. When you have a fraudulent
24 concealment -- I'm sorry, fraudulent inducement claim, the
25 question is, would the plaintiff have done something different

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1 if the information had been disclosed to the plaintiff?

2 And if that is correct, and it undoubtedly is correct,
3 it entitles us to demonstrate that the alternatives that they
4 had to Vale would not have -- were not sufficient to address
5 the threat to their corporate life. So that's the relevance.

6 Let me address the burden issue. We, in our document
7 request, we did something that I don't think we've done very
8 often in document requests, and I don't think plaintiffs do. I
9 don't think parties ordinarily do. We limited our request to
10 specify a group of people who are on the UK counterparts
11 restricted list. That is, the people who would know about
12 these deals. It's a limited group of people. And then we left
13 it open to say, and anybody else that we would agree to with
14 the plaintiffs.

15 We think this is a request that with respect to burden
16 could be easily addressed because, as your Honor knows, when
17 you have takeover transactions, the group of people in the know
18 is a relatively limited group of people. It's not an antitrust
19 case, where we're asking for tons of documents, and certainly
20 not the kind of requests that they've made to us with respect
21 to everything having to do with geology, but that's somewhat --

22 MR. LYTTLE: Your Honor, the fraudulent inducement
23 claim is about what Vale said to us in entering into the deed
24 and what they didn't say. It's not about the reason why we
25 approached Vale. We can even discuss the stipulation. We

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1 approached you because we wanted to raise cash. That doesn't
2 permit you to steal our information and enter into a RICO
3 conspiracy. But why we approached Vale is okay, and we can get
4 that.

5 But it's a pure fishing expedition to look at
6 completely unrelated transactions with completely unrelated
7 parties. And we've been very consistent about this. The data
8 room, as Mr. Liman pointed out earlier, contains information on
9 Simandou, another asset called potash and another asset called
10 calumba. We told them potash and calumba is off the table.
11 We're really focused on Simandou and we're focused on Vale.

12 THE COURT: Mr. Liman says that if you would have
13 entered into this transaction anyway, then there can't be a
14 fraudulent inducement.

15 MR. LYTTLE: Understood, your Honor. I would posit
16 that's an absurd proposition, that our client would literally
17 say, you know what, we know you're going to enter a deal with
18 Mr. Steinmetz and BSGR, we know you're going to steal our
19 mining rights, but we'll open -- we'll talk to you anyway,
20 we'll go open kimono and show -- that's absurd.

21 THE COURT: People do strange things in takeover
22 defenses, but what are we talking about in terms of volume or
23 burden?

24 MR. LYTTLE: Significant volume. I'm not even sure
25 that there is a restricted list with significant volume, more

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1 importantly, with very high-level CFOs, CEOs. This is a
2 significant burden, and we've got to look at every possible
3 transaction that we looked at. I'm not even sure, is an e-mail
4 that says: We should reach out to Estrada in London? Is that
5 relevant if we never did it? I don't know where you cabin
6 this. It's just not relevant. They got Simandou and they got
7 why we're talking to them, and that's all we need.

8 THE COURT: All right. Well --

9 MR. LIMAN: Your Honor, the restricted list is a
10 requirement of UK law. If they didn't have it, they were in
11 violation of UK law. This is a sophisticated company. They
12 plainly have that list.

13 MR. LYTTLE: I don't think the restricted list --
14 we're still trying to figure this out, in all honesty, your
15 Honor, but I don't think the restricted list in this case was
16 necessarily required. Mr. Liman is actually correct. If it
17 was required, we had one. The initial information is we do not
18 have one.

19 THE COURT: I'm sure between the two of you, you can
20 limit this to a very small group. The time period also seems
21 to be a small one. I'm ordering production in this area with
22 the exact details to be further worked out by the parties. So
23 that gives you a little bit of wiggle room, but --

24 MR. LYTTLE: Thank you, your Honor.

25 THE COURT: All right. I think that finishes

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1 everybody's letters. Other than picking a date for our next
2 marathon, any other issues for today? Okay.

3 MR. LYLE: Nothing from the plaintiff, your Honor.

4 MR. LIMAN: Nothing from Vale.

5 MR. FILARDO: Nothing from us, your Honor.

6 MR. SUMMIT: And I think nothing further from Thiam;
7 although, with some hesitation, your Honor.

8 THE COURT: Understood. All right. When do you all
9 want to come back? Right before Thanksgiving? Right after
10 Thanksgiving?

11 MR. LYLE: Right after Thanksgiving I think would be
12 okay.

13 MR. FILARDO: Your Honor, I think you've ordered that
14 there be a joint letter or individual letters by November 17th,
15 and the new protocol is that should be at least a week ahead of
16 our next conference; so I think that would put us after
17 Thanksgiving.

18 MR. LYLE: After Thanksgiving.

19 THE COURT: Okay. The week of December 1st. Anyone
20 have preferences?

21 MR. LIMAN: Your Honor, is there -- I hesitate to ask
22 this, but I'm scheduled to be in a Hong Kong that week. I
23 could, I think, appear on December 1st, if that's the Monday.
24 The rest of the week I'm out.

25 THE COURT: All right. Well, I mean, December 1st is

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1 right immediately after Thanksgiving, the Monday after
2 Thanksgiving. I'm not sure I want to impose that on all of
3 you. Indeed, for anyone traveling, that would be pretty
4 miserable. Do you want to kick it another week? So the week
5 of December 8th?

6 MR. LYLE: I think we all are in agreement, your
7 Honor, that that would probably be better, and we appreciate
8 that your Honor would not push us to come up on the weekend.

9 THE COURT: Anyone have a preference? Earlier in the
10 week sounds better than later in the week, but....

11 MR. SUMMIT: Earlier in the week is better for us, if
12 it works for the Court.

13 MR. LIMAN: Your Honor, I'm being told from the back
14 that if your Honor has time on December 9th, that we'd be --

15 THE COURT: Okay. December 9th at 10:00. Okay. See
16 you all then. Usual drill. Transcript pertains to the Court's
17 order, and you're all required to buy the transcript.

18 MR. LIMAN: Thank you.

19 (Adjourned)
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